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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. 657

THE CITY OF KANSAS CITY, KANSAS, a Municipal Corporation, *Appellant*,

vs.

THE UNITED STATES OF AMERICA; FRED A. SEATON, Secretary of the Interior; THE WYANDOTTE TRIBE OF OKLAHOMA; and L. C. MADDOX, Register of Deeds of Wyandotte County, Kansas,
Appellees.

and

GEORGE ZANE, JR., MARIE HATTORN, JULIA GRINDEL, RUBY VICKERS, DR. FRANK NORTHRUP, in Person and for All Persons Similarly Situated,
Appellants,

vs.

THE UNITED STATES OF AMERICA, FRED A. SEATON, Secretary of the Interior; THE WYANDOTTE TRIBE OF OKLAHOMA, a Corporation; L. C. MADDOX, Register of Deeds of Wyandotte County, Kansas,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS.

JURISDICTIONAL STATEMENT.

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STATEMENT AS TO JURISDICTION.

In compliance with Rule 15 of the Revised Rules of the Supreme Court of the United States, appellants submit herewith their statement as to the basis upon which the Supreme Court has jurisdiction to review by direct appeal the judgment of the United States District Court for the District of Kansas entered in these causes.

OPINIONS BELOW.

The Findings of Fact and Opinion of the District Court are attached hereto as Appendix "A".

JURISDICTION.

Appellants in both cases brought suit for judgment decreeing that the Act of August 1, 1956, 70 Stat. 893, 25 U.S.C., Sec. 791-807, be decreed unconstitutional and invalid, or in the alternative, that Section 5(c) thereof (25 U.S.C., Sec. 725(c) be decreed unconstitutional and invalid. It was further prayed that each of the defendants be restrained and enjoined from proceeding under said law or interfering in any way with appellants' interests in the Huron Place Cemetery. Further, appellants asked that the Register of Deeds of Wyandotte County, Kansas, be restrained and enjoined from filing any conveyance of said tract or any part thereof.

Applications for temporary restraining orders were filed and were thereafter granted on August 4, 1959.

On July 29, 1959, in accordance with the provisions of 28 U.S.C., Secs. 2282 and 2284, the Chief Judge of the

United States Court of Appeals for the Tenth Circuit appointed three federal judges of the circuit to hear and determine the causes.

Applications for an interlocutory injunction were filed by appellants, but action thereon was deferred until the hearing on the merits. Thereafter, the cases were consolidated for trial.

Defendants then filed a joint motion to dismiss both cases. Action thereon was deferred, for the convenience of the Court, until the Court convened in Kansas City, Kansas, to hear the entire matter.

Stipulations of Fact were entered into and the causes were heard by the three-judge court. There being no disputed issues of fact, briefs were ordered and were subsequently filed. Thereafter, on October 13, 1960, judgment was entered sustaining the defendants' joint motion to dismiss, and denying an injunction, all upon the sole ground that the complaints failed to state a cause of action upon which relief could be granted.

A motion for a rehearing was filed, heard and denied on October 13, 1960. A motion for a stay of proceedings pending an appeal was sustained.

A notice of appeal to the Supreme Court of the United States was filed on November 16, 1960.

The jurisdiction of the Supreme Court to review the decision below by direct appeal is conferred by 28 U.S.C., Sec. 1253. The following cases sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in these cases:

Radio Corporation of America v. *United States*, 99 F. Supp. 660, affirmed 341 U.S. 412, 71 S. Ct. 806, 95 L. Ed. 1062.

Florida Lime and Avocado Growers, Inc., v. *Jacobsen*, 362 U.S. 73, 80 S. Ct. 568, 4 L. Ed. 2d 568.

STATUTES INVOLVED.

Act of August 1, 1956, c. 843, 70 Stat. 893, 25 U.S.C., Sec. 791-807. (1958 Ed. pp. 4250-4252)

25 U.S.C., Sec. 345. (1958 Ed. p. 4172)

A full text of these statutory provisions is set out in Appendix "B".

QUESTIONS PRESENTED.

1. Do the complaints state a cause of action upon which relief can be granted against the defendants?

2. Does the District Court have jurisdiction over the subject matter in these actions?

3. Is the Act of August 1, 1956, c. 843, 70 Stat. 896, Sec. 5(c); 25 U.S.C., Sec. 791-807, a valid and constitutional exercise of powers vested in the Congress of the United States?

4. Can the Congress, in disregard of its treaty obligations, transfer property which had been deeded to the United States by an Indian nation to hold as trustee for said nation, to others than all of the descendants of the parties to the treaty?

5. Does *Conley* v. *Ballinger*, (1910) 216 U.S. 84, 30 S. Ct. 224, 54 L. Ed. 393, preclude the relief asked by appellants?

6. If *Conley* v. *Ballenger*, is dispositive of the issues in these cases, and precludes the relief asked for by appellants, should it be overruled?

7. Have rights to the Indian cemetery involved herein vested in the descendants of the Wyandotte Indian

Nation, which was a party to the Treaty of 1855, so that they cannot be taken from them without their consent, or without provision for compensation to all Wyandottes?

8. Does Congress have the right, particularly in view of Section 12 of the Act of August 1, 1956, to abrogate its contract with the City of Kansas City, Kansas, entered into on March 20, 1918, and which provided for perpetual care and maintenance of the Huron Place Cemetery by the city as a cemetery and park after substantial rights have vested in appellants?

STATEMENT.

As the court below observed, there is no disputed question of fact in these cases. The questions presented are questions of law only. This litigation is generated by rights appellants believe have accrued and vested in them by reason of the Treaty of January 31, 1855, between the Wyandotte Nation and the United States. 10 Stat. 1159. Appellants are resisting the attempts by Congress to wrest a sacred and historical heritage from them and confer the power of disposal in a splinter group of Wyandottes who do not represent all the Wyandotte descendants, including appellants in KC-1280, and those many hundreds they represent.

In order to lay the factual foundation for appellants' claims, it is necessary to refer to certain treaties between Indian tribes and the United States made prior to the Treaty of January 31, 1855. The equities, so apparent to the court below, should then be similarly apparent to this Court.

On May 18, 1818, at St. Mary's, Ohio, the Delaware Nation of Indians entered into a treaty with the United

States whereby they ceded to the United States all their claims to land in the state of Indiana. In return, the Government agreed to provide lands west of the Mississippi, and guaranteed the Delawares peaceful possession of same. 7 Stat. 188, 2 Kappler, *Indian Affairs Laws and Treaties*, pages 170-171.

On May 17, 1842, the Wyandotte Nation of Indians concluded a treaty with the United States. 9 Stat. 987, 2 Kapp. 587. By the terms thereof, they agreed to cede to the United States all their remaining lands in the states of Michigan and Ohio. The United States, in consideration of the cession, granted to the Nation a tract of land west of the Mississippi totaling 148,000 acres. The precise lands were not then ascertainable, but it was specified that the tract was to be located upon lands owned by the United States, and at that time set apart, or to be set apart in the future, for Indian use, and not already assigned to any other tribe or nation.

However, the Wyandotte Nation never did receive the land promised them by the 1842 treaty, and were compelled to buy lands from the Delaware Nation. On December 14, 1843, an agreement was entered into between the Delaware and the Wyandotte Nations, 9 Stat. 337, 2 Kapp. 1048, whereby the Wyandotte Nation purchased 36 sections of land from the Delawares. Three sections had been previously donated to them by the Delawares. This land was situated at the point of the junction of the Missouri and Kansas rivers where the city of Kansas City, Kansas, now stands. The purchase was agreed to and ratified by the United States. Treaty with the Wyandottes, April 1, 1850, 2 Kapp. 587. The Delaware lands were those provided them under the 1818 treaty.

The Treaty of April 1, 1850, sought to rectify the failure of the United States to live up to its bargain in the 1842 treaty. The United States further agreed upon consideration that the Wyandotte Nation release, relinquish, and give up their claims to the 148,000 acres of land, to pay them instead, the sum of $185,000.00, or $1.25 per acre. The Wyandottes agreed to use these funds to pay and extinguish all their just debts and for what was due for the lands under the agreement of 1843 with the Delaware Nation.

On January 31, 1855, the Government entered into a treaty with the Wyandotte Indians. 10 Stat. 1159, 2 Kapp. 677. It was stipulated in the first article that the tribe be dissolved, the Indians to become citizens of the United States and subject to the laws thereof, and the Territory of Kansas, although those who wished to be exempted from the immediate operation of such provisions should have continued to them the assistance and protection of the United States.

Article 2 provided for the cession of their holdings to the United States, which consisted of the lands obtained from the Delaware Nation by virtue of the 1843 treaty. The object of the cession was to subdivide the land and reconvey it by patent in fee simple, in the manner provided for in Article 4, to the individuals and members of the Wyandotte Nation in severalty.

Summarizing, the Wyandotte Indians agreed to cede their lands to the Government upon the condition only that the Government reconvey the land back to them by means of patents. It was purely a matter of convenience. The lands were the sole property of the Wyandottes purchased by them from the Delawares, although they were later reimbursed by the United States. Such reimbursement, how-

ever, was owed since the Government had acquired the Wyandotte's holdings in Ohio and Michigan by the 1842 treaty.

To those individuals of the Wyandotte Tribe, who in the opinion of the commissioners were competent to be entrusted with the control and management of their affairs and interests, the patents were to be an absolute and unconditional grant in fee simple. However, those not competent were to receive patents which contained restrictions with respect to sale or alienation for a period of five years, and such sale or alienation could not be made then without the express consent of the President of the United States.

All claims under prior treaties were released by the Wyandotte Nation. Article 1 of the treaty provided for the dissolution and termination of the Wyandotte Indian Tribe.

As set out in paragraph 2 of the Stipulations of Fact (R. 31), the commissioners appointed to carry out the provisions of the treaty listed *469 competent individuals.* Incompetents totaled 45, orphans 41. Sixty-two persons applied for exemption from citizenship (R. 31).

All of the land ceded by the Wyandotte Nation to the United States was allotted by the commissioners to the heads of all the families of the four enumerated classes, except Allotment No. 282, which was denoted a public burial ground, and three other small tracts not herein involved. Allotment No. 282 is the Huron Place Cemetery, the subject of this litigation. The cemetery lies in the center of the business area of Kansas City, Kansas, is a little over two acres in area, and except for walks, walls, steps and gravestones, remains in its natural state.

Most of the individuals classified as incompetent, and those who asked to be exempt from citizenship, in addition to some of the orphan class, left the Kansas City, Kansas, area and moved to a reservation in Oklahoma in 1867. It has been agreed and stipulated that the defendant, the Wyandotte Tribe of Oklahoma, a corporation, consists mainly of the descendants of said classes and people who intermarried with them (R. 31).

In 1892, the entire Wyandotte reservation in Oklahoma was allotted to only 244 individuals. In 1902, the number of these Wyandottes totaled but 325. 1 Kapp. 1040.

The Huron Place Cemetery has been in continuous use since 1843. Between 500 and 800 interments have been made therein. The latest interments were in 1958 (R. 32).

Article 2 of the treaty provided that by patent, as heretofore set forth, the United States would reconvey the land to individuals and members of the Wyandotte Nation, except "the portion now enclosed and used as a public burying ground shall be permanently reserved and appropriated for that purpose; * * *". It has been agreed that the term "public" as referred to in said treaty means only Wyandottes and their descendants. It has been further agreed that all of the descendants of the Wyandotte Nation have the right to be interred in said cemetery without cost. These descendants include the five named plaintiffs and all of the class they represent in this action (R. 32).

The contract between the United States and the city of Kansas City, Kansas, attached to the complaint in KC-1279 (R. 6, 7, 8), recognizes the use of said cemetery for persons of Wyandotte descent. The Wyandottes of Oklahoma have their own cemetery there and have not used the Huron Place Cemetery since they removed themselves from Kansas in 1867 (R. 32). The record is barren of any

interest being displayed by the Oklahoma Wyandottes in said cemetery since they left Kansas except to sell it and appropriate the funds to their own use.

For all intents and purposes, the Wyandotte Nation ceased to exist as a political entity. A loose form of tribal organization existed in Oklahoma subsequent to 1867, but it has never purported to represent all the descendants of the Wyandotte Nation of Indians.

The Oklahoma Indian Welfare Act of June 26, 1936, 49 Stat. 1967, 25 U.S.C., Sec. 503, *et seq.*, provides in section 3(b) for the organization of Oklahoma Indian tribes into corporations. Pursuant to said action, a constitution and by-laws were adopted by the Wyandotte Tribe of Oklahoma and ratified on July 24, 1937. A charter issued by the Secretary of the Interior was ratified on October 30, 1937.

By provision of the constitution of the Wyandotte Tribe of Oklahoma, membership in the group is limited to "those persons of Indian blood whose names appear on the official census rolls of the tribe as of January 1, 1937, and their descendants." The governing body of said tribe must, according to the provisions contained in the constitution, be residents of Oklahoma (R. 33).

It has been agreed and stipulated that the government, since 1937, has dealt with the Wyandotte Tribe of Oklahoma as the sole representative of Wyandotte descendants. Citizens Wyandottes of other states, including plaintiffs in KC-1280, have always been excluded from the group (R. 33).

On August 1, 1956, Congress enacted public law 887, 70 Stat. 893, 25 U.S.C., Sec. 791-807. Section 3 of the Act provides for the preparation of a proposed roll of the members of the tribe living on the date of the Act for publica-

tion thereof in the Federal Register. Pursuant to such provisions, the Wyandotte Tribe of Oklahoma prepared a membership roll and submitted it to the Secretary of the Interior for approval. Many of the people in and around Kansas City, Kansas, including appellants, and those they represent, who have never been registered as members of the Wyandotte Tribe of Oklahoma, appeared and sought to be included on the roll. Most of these people were denied membership and many appealed to the Secretary of the Interior as provided by the Act (R. 33). The Secretary overruled all but five of these appeals and published a final membership roll of the Wyandotte Tribe in the Federal Register on February 25, 1959, at page 1382, *et seq.*

Section 5(c) of the 1956 Act provides for the disposition by transfer or sale of said Huron Place Cemetery, and distribution of the proceeds among the members of the tribal corporation.

Summarizing, the Act provides for sale of the Huron Place Cemetery, removal of the bodies therefrom, and interment elsewhere, and distribution of the proceeds to the members of the Wyandotte Tribe of Oklahoma, the descendants of those classes of incompetents, orphans, and those refusing citizenship, who left the state of Kansas and took up residence in Oklahoma in 1867. Section 2(b) further provides that the Oklahoma corporation, which is to be dissolved by the Act (Sec. 14), may elect to retain its property, which includes Huron Place Cemetery, by transferring it, with the approval of the Secretary of the Interior, to a corporation or other legal entity as elsewhere provided in the Act. The Wyandottes of Oklahoma, however, desire to sell said cemetery and distribute the proceeds among themselves. Bids have been taken, but such bids have been refused as of this time by the Government as inadequate in amount (R. 31).

By these actions, the appellants sought to enjoin the transfer of the Huron Place Cemetery and have judgment decreeing the 1956 Act, particularly Sec. 5(c) thereof, as unconstitutional and invalid.

This appeal is taken from the judgment of the three-judge court below dismissing the complaints on the ground that they failed to state a cause of action upon which relief could be granted.

THE QUESTIONS ARE SUBSTANTIAL.

In legal nomenclature, these cases are before the Court simply because the court below was of the opinion that appellants had failed to show that under existing law they are entitled to relief. But inherent in the summary disposition of appellants' claim, which included the birthright of several thousand descendants of the once great Wyandotte Indian Nation, are grave and impelling constitutional questions, headed by the inquiry which has troubled the courts for many years—how far will the Government be permitted to go in its dealings with the American Indian?

KC-1280 has been instituted by five Wyandotte descendants representing hundreds of others who have descended from the parties to the 1855 treaty. The decision in KC-1279 in large part hinges upon the determination of the Wyandottes' action.

Many questions, all of them going to the basic structure of our constitutional form of government and concepts of fair play, equity and justice, have arisen in these actions.

They are substantial questions. They are fundamental. They beg decision delineating the power of Con-

gress and our Government over the property and rights of the American citizens—be they Indians, or of any other color or origin.

We put it this way:

(a) What right has Congress to deal with a small segment of the descendants of the once great nation of Wyandotte Indians who, in order to reap the benefits of the Oklahoma Indian Welfare Act of June 26, 1936, have incorporated, as though *they* are *the* Wyandottes?

(b) Where has Congress acquired the power to pass a law taking an ancient and historical burial ground of the Wyandotte Nation, used extensively over a period of 117 years, and placing the power of disposal in such a group?

(c) Does Congress have the right to empower a splinter group of Wyandotte descendants, who not only refused citizenship or were incompetent, and left the state of Kansas and the burying ground, never having used it for 93 years, to dispose of the cemetery, desecrate the remains of hundreds of Wyandottes buried there, in derogation of the rights of many Wyandotte descendants who did acquire citizenship and who have many of their ancestors in the cemetery?

(d) Can Congress compel the sale and disposal of this property by granting the power of disposal to this splinter group and ignoring the rights of the citizen Wyandottes, and denying them any voice in the matter?

(e) What right has the Secretary of the Interior to treat with the Oklahoma Wyandottes only on the subject of the cemetery?

(f) Can Congress confer upon the Oklahoma Wyandottes the right to maintain that they are the owners of property they abandoned 93 years ago,

and which had been ceded to the Government in good faith by the Wyandotte Nation to hold as trustee for a special purpose for *all* Wyandottes and their descendants?

(g) Does the Government have the right to wrest away from all Wyandotte descendants their rights in and to said cemetery as a heritage: a resting place for the bones of their ancestors; and for many, a place in which they themselves wish some day to be buried?

(h) Under ordinary principles of law, justice and equity, will the Court sanction the attempt by Congress to take away the property of all the Wyandottes and give it to a small segment thereof who happen to have been government wards for over a hundred years? Is not such action invalid? Is not such action one of confiscation?

(i) Will not the courts hold that the 1956 Act is arbitrary and confiscatory since the power to sell or retain the Huron Cemetery is vested by congressional act in a small group who have displayed absolutely no interest in the property for one hundred years, except to sell it, do not live in the area, have had no burials in the cemetery since that period of time, and have in fact abandoned it?

The court below made it clear that its sympathies were not with the Oklahoma Wyandottes upon whom it placed the appellation "splinter group".

At one point in the oral argument, Judge Hill said:

"I think I can speak for the three of us here: I think we all agree that the equities in the case are undoubtedly on the side of the plaintiffs, but we are faced with the law of the case." (R. II 49).

Judge Huxman later added:

> "We will be glad to hear Mr. Farley if he has anything further to argue. We want to give you every opportunity to present every question. It is a bothersome thing. I think you all realize where the Court's sympathy is in this case. As far as I am concerned, it isn't with the Oklahoma Indians, I can tell you that." (R. II 69).

But the Court felt bound by the 1910 decision of *Conley* v. *Ballinger, supra.*

It is submitted that the appellees will not seriously argue that the questions herein are not substantial. Not only are serious constitutional questions involved, but the interests of a large group of people.

The Huron Cemetery, as conceded by appellees, is an attraction to the city of Kansas City, Kansas, and has historical significance and distinction as a monument (R. II 81). Kansas was admitted to the Union in 1861. The cemetery was in constant use eighteen years before that. The city of Kansas City, Kansas, developed around it. It has become an integral part of the city and area and is marked on many highway maps as an interesting historical spot (R. II 82). Many of the streets in Kansas City, Kansas, are named after famous and prominent Indians who are buried there.

Efforts to sell the cemetery have continued unrelentingly since the 1890's. In 1906, Congress passed an act providing for its sale. 34 Stat. 325, 348. So great was public clamor in opposition to the sale, particularly after the Supreme Court declined to interfere in *Conley* v. *Ballinger, supra*, that Congress later repealed the law.

Public interest in this litigation is high in the Kansas City area. The cemetery, a lovely spot located on the high-

est point in Kansas City, Kansas, has been the subject of many news stories, features and articles.

1. Conley v. Ballinger Is Not Applicable.

Most of the oral argument centered around this case which involved this same cemetery. The court below, though sympathetic, was of the opinion that *Conley* precluded appellants' contentions, and was authority for the principle that Congress had the power to do with Indian property as it pleased. Breaking Indian treaties, a practice of long standing, though apparently abhorred by the lower Court, was felt to be the prerogative of the United States Government. Its obligations under such treaties rested on moral grounds rather than legal grounds. *Becher* v. *Wetherly*, 95 U.S. 517, *Lone Wolf* v. *Hitchcock*, 187 U.S. 553. However, the fact structure of this case differs so materially from the earlier cases, and from *Conley*, that it becomes imperative that *Conley* be re-examined to determine its applicability. If *Conley* is still good law, then no Indian land is secure—no Indian title safe—the Constitution with respect to Indians has been shelved.

At the outset, it must be borne in mind that *Conley* was brought by an individual, without legal counsel, who was unable to establish two essential matters: (1) that she had an interest in the cemetery amounting to at least $2,000.00, the then prerequisite jurisdictional amount, and (2) that her rights were tribal rights in contradistinction to individual rights.

In the Wyandotte case at bar, the action was brought as a class action, the jurisdictional amount not being disputed, if pertinent; and against the Government by the authority of a federal statute, 31 Stat. 760, 25 U.S.C., Sec. 345, the general allotment statute which permits a direct action against the United States. Also, and inextricably

intermingled with the plaintiffs' theory, is the protection of the Fifth Amendment to the Constitution of the United States. All of these matters, as fundamental as the "moral obligation only" argument of the appellees, are such that basic distinctions between *Conley* and the case at bar appear evident and crucial.

In substance, the Supreme Court held that Congress has complete legislative power over the land of the Wyandottes while it remained in their occupation before they quit-claimed it to the United States. The land remained, it was said, as it had before, in the ownership of the United States subject to the recognized use of the Wyandottes.

The real crux of *Conley* is contained in the following language of Justice Holmes:

> "There is no question as to the complete legislative power of the United States over the land of the Wyandottes while it remained in their occupation before their quit claim to the United States. *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565. When they made that grant they excepted this parcel. Therefore, it remained, as the whole of the land had been before, in the ownership of the United States, subject to the recognized use of the Wyandottes. But the right of the Wyandottes was in them only as a tribe or nation. The right excepted was a right of the tribe. The United States maintained and protected the Indian use or occupation against others, but was bound itself only by honor, not by law. This mode of statement sounds technical perhaps, but the principles concerned are not so. The Government cannot be supposed to have abandoned merely for a moment and for a secondary matter its general attitude toward the Indians, as wards over whom and whose property it retained unusual powers, so long as they remained set apart from the body of the people. The very Treaty of 1867, cited in the bill, providing for the resumption of the tribal mode of life

by the Wyandottes, shows that the United States assumed still to possess such unusual powers. It seems to us that the reasonable interpretation of the language as to the burying ground is not that the United States declares itself subject to a trust which no court could enforce against it, if against anyone (see *Naganab* v. *Hitchcock*, 202 U.S. 473; *Oregon* v. *Hitchcock*, 202 U.S. 60), while on the other hand it stripped itself of any protecting power that otherwise it might have retained. It seems to us more reasonable to suppose that the words 'shall be permanently reserved and appropriated for that purpose,' like the rest of the treaty, were addressed only to the tribe and rested for their fulfilment on the good faith of the United States—a good faith that would not be broken by a change believed by Congress to be for the welfare of the Indians.

"We are driven to the conclusion that even if the suit is not to be regarded as a suit against the United States within the authority of the cases cited, 202 U.S. 60 and 473, the United States retained the same power that it would have had if the Wyandotte Tribe had continued in existence after the treaty of 1855, that the only rights in and over the cemetery were tribal rights, and that the plaintiff cannot establish a legal or equitable title of the value of $2,000, or indeed any right to have the cemetery remain undisturbed by the United States."
(pp. 90, 91)

If the background of *Conley* were unknown, it would seem that this language is conclusive. However, the decision must be considered in view of the particular statute involved and the status of the Wyandotte Nation at that time.

The statute complained of in *Conley* was passed by Congress in 1906, 34 Stat. 325, 348. It provided that the cemetery was to be sold and the proceeds, after certain deductions, paid to the parties to the treaty of 1855, or their

representatives. For purposes of comparison, it must be noted that Congress at that time recognized that the cemetery belonged to *all* the Wyandottes, not just a few. The 1956 Act, on the other hand, treats the Oklahoma Indians only as being the owners of the land in question. Tribal rights are ignored, except such rights as might be recognized by the Oklahoma Indians who have formed a corporation.

When *Conley* was decided, the Supreme Court acknowledged the dissolved status of the tribe, and when it rejected Mrs. Conley's claim as being that of an individual only, it pointed out "that the only rights in and over the cemetery were tribal rights" (page 91).

Thus, in *Conley*, the Supreme Court recognized tribal rights as belonging to all Wyandottes, contrary to the 1956 Act, which vests the fee in such land in a small group of Wyandottes only.

It is exceedingly doubtful that Justice Holmes, who epitomized equity, justice and traditional American fair play, would approve the creation of a fee title in the splinter group of Wyandottes by the simple expedient of the Government divesting itself of its trust status and making this group the recipient of the conveyance—to the exclusion of their fellow Wyandottes. *Conley* strengthens rather than weakens appellants' argument that the equitable title in the cemetery vested in the parties to the 1855 treaty and *all* their descendants.

The situation has not changed since *Conley* except the descendants are more numerous, and one group, a small group, has elected to form a corporation. This corporation, with the approbation of Congress, has now presumptively asserted its representation of *all* the Wyandottes *except*

insofar as other Wyandottes being given a voice and a share in tribal affairs and property. This is rejected.

The force of *Conley*—and its applicability, is dissipated since the 1906 Act cannot be compared to the 1956 Act.

Justice Holmes pointed out that there is little doubt as to the complete legislative power of the United States over the Wyandotte land before it was quit-claimed to the United States. The inference is that the United States could do anything it pleased with the land, including taking it, though owned by the Wyandottes. By way of emphasis, it will be recalled that the land had been purchased by the Wyandottes from the Delawares, who in turn had owned it since 1818. The land was not owned by the United States before it was purchased by the Wyandottes. While they were later compensated $1.25 per acre, such sum was compensation for the ceded Ohio and Michigan lands which up to that time had been taken without any consideration whatsoever. Thus, in 1855, the Wyandotte Nation merely ceded the Kansas land to the Government as a convenience so it in turn could be systematically allotted back to them. At that moment, the great majority of the Wyandottes became citizens of the United States subject to the protection and guarantees of the Constitution, including the prohibitions of the Fifth Amendment. These protections and prohibitions extended to them when they agreed that the Government retain Allotment No. 282 to be reserved as a burying ground. Highly summarized, the Wyandottes quit-claimed their land in fee simple to the Government for a definite purpose—to be preserved as a cemetery. A trust was created, pure and simple, with the United States holding the legal title while the Wyandottes and their descendents held, as a group, the equitable title. And these Wyandottes were—it must be further

emphasized, citizens of the United States whose rights are no different from others of the same color or of any other color—of the same origin or any other origin.

This is not a case of the United States simply ignoring its treaty obligations, but one where the Government is attempting to deprive a group of citizens of vested property rights. *Conley* does not touch upon this feature, but is limited only to a reiteration of the principle that such treaties rest only upon the good faith of the United States.

Holmes acknowledged that the United States possessed unusual powers over the Indians but he carefully said:

> "So long as they remain apart from the body of people." (page 90).

Those who elected to remain apart in this case consisted only of most of the incompetent class, those who rejected citizenship, and some of the orphans. They were only a small portion of the total number of Wyandottes (R. 31). Probably less than 20 percent of all Wyandottes chose to continue their former mode of life. Surely this did not entitle them in later years to confiscate the property of their brothers.

By the 1956 Act, Congress is invoking the old doctrine of good faith coupled with the conscience-saving concept of doing what is best for the welfare of the Indians, failing to realize that the line of cases involving treaties is not applicable in that respect since the parties to this treaty, except a few, immediately became citizens, and to break faith with them as citizens would be taking their property without due process of law unless compensation would be payable to all Wyandottes as provided in the 1906 Act.

Furthermore, *Conley* ascribes this power to derogate treaties to the Government on the theory that if a change is believed by Congress to be for the welfare of the Indians, it can be made. But, this language is not applicable then or now since the tribe has disintegrated and most of its members became citizens. Such language sounds peculiar when placed in its proper setting. A serious question arises with reference to whether the mere taking of citizenship by the Wyandottes precluded them from any interest in this property and subordinated such interest to that of a small group which rejected citizenship.

Before leaving *Conley*, it must be stressed that Holmes recognized "tribal rights" as being the only rights in the cemetery. This is the law of the case, and we believe he was correct. The "tribal rights" cannot be anything but the rights vested in the tribe as a whole. Since the tribe had ceased to exist, the rights had to be in those members who were parties to the treaties and their descendants. It seems clear then that as long as the Government retains its legal title to the cemetery it holds for the parties and descendants. The mere act of incorporating on the part of the Oklahoma Wyandottes should not raise any presumption that they are the *only* Wyandottes.

Congress has exercised an almost despotic power to abrogate treaties with the Indians. In many instances its lack of good faith rivaled that of an autocratic Asiatic potentate. But, the treaty-making period ended with the Act of March 3, 1871, 16 Stat. 544, 546, 25 U.S.C., Sec. 71. A substantial question arises as to whether in these modern times with the enlightened and humane view the courts now have towards subjugated and minority peoples, that Congress can in such cavalier fashion continue to exercise an unlimited power to abrogate treaties with Indians.

2. Can Congress Take Property from One Group of Indians and Give It to Another?

Another question arises which merits the attention of the Court. Have we not progressed to the point where Indians, particularly citizen descendants of parties to a treaty, are entitled to the same consideration and protection as other citizens of the United States? Will this Court permit Congress to take property from one group and give it to another under the guise of good faith and for the alleged betterment and welfare of the favored group?

The modern view is expressed in *Shoshone Tribe of Indians* v. *United States*, (1937) 299 U.S. 476, 57 S. Ct. 244, where the Court stated:

> "Syllabus 9. Power to control and manage property and affairs of Indians in good faith for the betterment and welfare may be exerted in many ways and even in derogation of provisions of a treaty, but power does not extend so far as to enable the Government to give tribal lands to others or to appropriate them to its own purposes without rendering or assuming obligations to render just compensation since such act would not be an act of guardianship but an act of confiscation. (Constitutional Amendment 5)."

The facts were that the Government, contrary to its treaty, and over the protests of the Shoshones of the Wind River Reservation of Wyoming, moved a band of Arapahoes on the reservation. Furthermore, the Government treated the funds claimed by the Shoshones as the joint property of both tribes.

The Court added:

> "The right of the Indians to the occupancy of lands pledged to them may be one of occupancy only, but it is 'as sacred as that of the United States to the fee.'"

Relief was granted.

Of similar import is *United States* v. *Creek Nation*, (1935) 295 U.S. 103, 55 S. Ct. 681, 79 L. Ed. 1331, an action by an Indian tribe to recover compensation for certain lands which had been appropriated by the United States. An erroneous survey had been made of lands in Oklahoma which had been granted under a treaty to the Creek tribe by patent carrying a fee simple. By later treaty, the Creeks ceded to the United States the westerly half of the tract and expressly retained the easterly half. Other conditions in the treaty generally guaranteed to the Creeks quiet possession of their unceded lands. However, the surveys encroached upon this land. The tract ceded to the Government plus the land encroached upon was then assigned by the United States to the Sac and Fox Indians. The question posed was whether there was an appropriation or the taking of the lands by the United States.

The Court held there was, saying:

> "But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inherent in such a guardianship and to pertinent constitutional restrictions. *It did not enable the United States to give the tribal lands to others* or to appropriate them to its own purposes without rendering or assuming an obligation to render just compensation for them. For that 'would not be an exercise of guardianship but an act of confiscation.'" (Emphasis supplied)

A similar result was reached in *Chippewa Indians* v. *United States*, (1938) 301 U.S. 358, 57 S. Ct. 826, 83 L. Ed. 1067. A band of Minnesota Chippewas brought the action to recover the value of lands allegedly ceded to the United States under an express trust for such Indians and subsequently disposed of or appropriated by the United States in

disregard of the trust. This particular band of Indians, known as the Red Lake band, claimed that certain property they owned belonged to their band only and did not belong to all the Chippewas. It will be noted that this situation is exactly the opposite of that in the case at bar. The legal principles, however, do not differ in any respect.

The primary question was whether the Government had the right, contrary to the treaty provisions, to consider the Red Lake reservation as belonging to all the Chippewas in Minnesota rather than the Red Lake band. The Court held that it did not belong to all the Chippewas, saying on page 375:

> "Our decisions are recognizing that the Government has power to control and manage the property and affairs of its Indian wards in good faith for their welfare, *show that this power is subject to constitutional limitations and does not enable the Government to give the lands of one tribe or band to another or to deal with them as its own.*" (Emphasis supplied).

The applicability of such language to the case at bar is evident. Further comment thereon seems superfluous.

3. Do the Appellants in KC-1280 Have Vested Rights in the Cemetery?

The court below appeared satisfied that under existing law and *Conley*, appellants in KC-1280 had no vested rights in the cemetery. This again manifests the belief that the treaty-breaking powers of the Government effectively precludes such rights.

Is it possible for appellants to have such vested rights?

We believe that such rights can and do vest. There is ample authority for the proposition.

In *Morrow* v. *United States*, 243 Fed. 854 (C.A. 8), in speaking of the attempt of the state of Minnesota to levy taxes on land obtained by Chippewa Indians from the Government by trust patents providing tax exemption for 25 years, the court said:

> "The Government may in its dealings with Indians create property rights which, once vested, even it cannot alter, and such property rights may result from agreements either in the form of a treaty or of a statute: the important considerations being that there should be the essentials of a binding agreement between the Government and the Indian and the resulting vesting of a property right in the Indian."

United States v. *Alcea Band of Tillamooks*, (1946) 329 U.S. 40, 67 S. Ct. 172, 91 L. Ed. 37, is one of the later cases on the subject. The action was brought by the Alcea band and others against the United States asking compensation for lands taken. The Indians had entered into a treaty which provided for the cession of their lands in return for certain money payments and creation of a reservation. The treaty was to be operative only upon ratification which was never had. Later, other tribes were moved on the reservation, and by executive orders and statutes the size was progressively reduced, all contrary to the terms and conditions of the treaty.

The Court unequivocably took the position that there were rights in land which was taken by the Government contrary to the terms of the treaty and that compensation should be given those whose land was taken. The Court rejected the "moral obligation" theory of the Government, stating:

> "Whether this tract * * * was properly called a reservation * * * or unceded Indian territory, is a matter of little moment * * * the Indians' right of occu-

pancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon." (p. 52).

The Court held that the power of Congress over Indian affairs may be of a plenary nature, but it is not absolute. On page 54, the Court had this to say:

"It does not 'enable the United States to give the tribal lands to others or to appropriate them to its own purposes, without rendering or assuming an obligation to render just compensation for them.'"

The applicable law is well stated in 42 C.J.S., *Indians*, Sec. 25, page 683:

"In carrying out its treaty obligations with Indian tribes, the federal government is something more than a contracting party; it occupies a position of trust so that its conduct must be judged by the most exacting fiduciary standards. The federal government is a guardian of its solemn agreements with the Indians over which it has reserved supreme power, and it may not repudiate such an agreement which is based on what the government has recognized as its vested right, protected by the Constitution, nor may a state or political subdivision thereof so do. So, when rights have vested under treaties, Congress has no power to impair them; nor does the executive branch of the Government have such power."

4. Is Title 25, United States Code, Sec. 345, As Amended, Applicable in This Case?

This particular statute (see Appendix "B"), enacted in 1894 and amended thereafter, Act of February 6, 1901, c. 217, Sec. 1, 31 Stat. 760, provides for the determination of claims to allotments or parcels of land to which Indians claim to be lawfully entitled. The United States is specifically made a party defendant in such actions.

This statute was not mentioned in *Conley*, though the Huron Place Cemetery was an allotment of land within the meaning of the statute (R. 31). Futhermore, the doctrine that the Government has nothing more than a moral obligation to keep its word with the Indians has its limitations, since the Indian can litigate his claim in court under this law.

The question is thus raised, and assumes prime importance since the court below refused to consider it: is the force of *Conley* and the line of decisions giving the Government the right to break its treaty obligations with the Indians dissipated by Section 345?

Space will not permit mention of more than a few of the decisions recognizing the right of Indians to bring an action against the United States to resolve disputes arising out of allotments. The Huron Place Cemetery was denoted Allotment 282 (R. 31).

In *Gerard* v. *United States*, 167 F.2d 951 (C.A. 9), it was held that the right of an Indian ward to sue in the United States District Court in an action respecting his rights under a patent held by the United States as trustee is conferred by this statute. The court pointed out that the 1901 Act gave jurisdiction to a district court *when an Indian is seeking to establish his right to an allotment; and where he is seeking to protect his interest in land to which he may be entitled under any grant made by Congress.*

Gerard stressed that the jurisdiction of the district court was not limited to those situations where allotments were sought in the first place.

United States v. *Pierce*, 235 F.2d 885 (C.A. 9), held that the 1894 Act, as amended in 1901, gave the Indians the right to sue in the United States District Court respect-

ing rights under a patent where the United States was trustee. Jurisdiction did not depend upon the alleged unlawful denial of a patent, but may be invoked to adjudicate conflicting claims.

The same conclusion was reached in *United States* v. *Fairbanks*, 171 F.2d 337 (C.A. 8).

In *St. Marie* v. *United States*, 24 F. Supp. 337 (D.C.S.D. Cal.), where an action was brought in equity to compel the issuance of trust allotment patents, the court said:

> "The superior title of the government in tribal lands and in allotted lands where no patents have been issued implies, of course, wise management. That does not confer on the government the right to despoil a tribe or an allottee of an accrued right."

Such language would indicate that under Section 345, the right of the Government, through its Congress, to vest title to lands previously allotted to the Wyandotte Nation in only a small segment of the Wyandotte heirs and descendants would be litigation cognizable in the United States District Court in an action as in the case at bar, with the United States as a party thereto.

The following language from *Segundo* v. *United States*, 123 F. Supp. 554 (D.C.S.D. Cal.), seems particularly appropriate:

> "This Court has jurisdiction over controversies between the Secretary of the Interior and those claiming to be entitled to allotments 'in relation to their rights thereto.'"
>
> 25 U.S.C., Sec. 345, is cited as authority.

A grave question is thus raised. If this action can be interpreted as one adjudicating conflicting claims to an allotment of land held in trust by the Government which

we submit it must, did not the court below have jurisdiction irrespective of *Conley*?

5. What Effect Should Be Given to Section 12 of the Act of August 1, 1956, 70 Stat. 893, 25 U.S.C., Sec. 791-807, in KC-1279?

Section 12 of the 1956 Act provides in pertinent part as follows:

> "Nothing in Section 791-807 of this Title shall abrogate any valid lease * * * or other contract heretofore approved."

This is a statutory exception to the body of this act couched in positive and unambiguous language, and we must assume Congress inserted this exclusion for some definite purpose.

The contract involved herein was approved by the Department of Indian Affairs on the date stamped thereon, April 17, 1918. This contract "to forever maintain, care for, preserve * * *" has been faithfully kept and relied upon by all the parties. Valuable and lasting improvements have been made and several generations of beneficiaries of the agreement have grown to expect the right of future enjoyment based on their ancestral heritage, and confirmed by the positive action of the Government.

Where an exception in a statute contains such positive language as is found in Section 12 of the Act, there remains little room for statutory construction since the section apparently means what it says, and if read literally, it would certainly cover the contract between the Government and the City. We maintain that this is not a proviso, but a clear-cut exception, taking a class of obligations out of the operation of the statute. Apparently it was the humane purpose of Congress in winding up the affairs of the Okla-

homa Wyandottes not to do injustice to any individual or set of individuals whose rights had become vested. It is not often that exceptions in statutes have been construed by the courts, but generally exceptions in a statute should be strictly but reasonably construed in conformity with the purpose and meaning of the statute. 82 C.J.S., *Statutes*, Sec. 382c, page 891:

> "For as Mr. Chief Justice Marshall pointed out in *Brown* v. *Maryland*, 'A rule of interpretation to which all assent, (is) that the exception of a particular thing in general words, proves that in the opinion of the lawgiver, the thing excepted would be within the general clauses, had the exception not been made,'" 12 Wheat. 419, 438, 25 U.S. 419, 438, 6 L.Ed. 678. *In re Otto*, 146 F. Supp. 786, 789.

The City of Kansas City, Kansas, has performed its obligations under the contract. Its right to relief depends partly upon the rights of the Wyandotte descendants in KC-1280. To deny the relief sought by all the appellants in these cases would be in direct violation of Section 12 and would be depriving the City of a valuable property right without due process of law. The passage of time has ripened the right of the City under the agreement into an extremely valuable one. Such rights under our constitutional form of government may not be thrust aside except under extremely compelling circumstances.

CONCLUSION.

The basic question in these cases is the power of Congress to disregard a treaty obligation with an Indian nation. As is often the case, however, a single question may generate a host of other questions, all equally grave and compelling, in order to resolve itself.

Such is the case here.

The applicability of *Conley* v. *Ballinger*; if determinative, should it be overruled; the responsibility of the United States towards its treaty obligations with the Indians; the taking of property from one group and giving it to another; the applicability of 25 U.S.C., Sec. 345; whether or not rights have vested in the descendants of Wyandottes to the Treaty of 1855; who if anyone represents all the Wyandottes; the right of Congress to single out a small group and give them the power of disposal of a cemetery not used by them for 93 years, but on the contrary, used by a much larger group who are being ignored; the effect of the constitution and by-laws of the Oklahoma corporation which excluded appellants and those they represent from membership; whether "tribal rights" as mentioned by Justice Holmes in *Conley* are the rights of appellants; does Section 12 of the Act of August 1, 1956, mean what it says; does Section 12 apply to the contract between the City of Kansas City, Kansas, and the United States; has the attitude of the courts toward the Indians undergone a change since the treaty-making period; does the fact that the ancestors of appellants became citizens immediately upon ratification of the Treaty of 1855 work a substantial change with respect to the applicable law so that these cases can be determined on constitutional principles only; and if so, is Section 5(c) of the Act of August 1, 1956, constitutional; what effect does abandonment of the cemetery by the Oklahoma Wyandottes have on their claim and that of appellants? What effect is to be given admissions of the Oklahoma group made in pleadings filed in certain cases pending before the Indian Claims Commission that "no organization exists recognized by the Secretary of the Interior as having authority to represent the tribe or nation"? (Pl's Ex. 4-10).

These are some of the questions that compel scrutiny in order to reach the ultimate question of whether the court below was correct in dismissing these cases on the narrow holding in *Conley*.

To several thousand Wyandottes, and to the people of Kansas City, Kansas, these are substantial and important questions. To the body of constitutional law and to the people of our nation, insofar as they touch upon questions of due process, confiscatory legislation, and equal protection of the laws, they are equally substantial and grave. The questions raised, we submit, are not easily disposed of. It is earnestly submitted that the Court note probable jurisdiction, give these matters plenary consideration, with briefs on the merits and oral argument for their resolution.

Respectfully submitted.

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Attorneys for Appellants.

APPENDIX

APPENDIX "A".

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS.

THE CITY OF KANSAS CITY, KANSAS, a Municipal Corporation,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA; FRED A. SEATON, Secretary of the Interior; THE WYANDOTTE TRIBE OF OKLAHOMA; and L. C. MADDOX, Register of Deeds of Wyandotte County, Kansas,

Defendants.

No. KC-1279

and

GEORGE ZANE, JR., MARIE HATTORN, JULIA GRINDEL, RUBY VICKERS, DR. FRANK NORTHRUP, in Person and for All Persons Similarly Situated,

Plaintiffs,

vs.

UNITED STATES OF AMERICA, FRED A. SEATON, Secretary of the Interior; THE WYANDOTTE TRIBE OF OKLAHOMA, a Corporation; L. C. MADDOX, Register of Deeds of Wyandotte County, Kansas,

Defendants.

No. KC-1280

Messrs. Alan W. Farley, Charles W. Brenneisen, and Joseph A. Bukaty, for Plaintiff in Number KC-1279;

Messrs. Alan W. Farley and Joseph P. Jenkins, for Plaintiffs in Number KC-1280.

Wilbur G. Leonard, United States District Attorney, for Defendants.

Before HUXMAN, United States Circuit Judge, PICKETT, United States Circuit Judge, and HILL, Chief Judge, United States District Court.

FINDINGS OF FACT AND OPINION.

(Filed September 28, 1960.)

In Number KC-1280, George Zane, Jr., and others, sought to enjoin the United States, Fred Seaton, as Secretary of the Interior and the Wyandotte Tribe of Oklahoma from selling a tract of land located in Kansas City, Kansas, known as the Huron Place Cemetery, and sought to enjoin L. C. Maddox, Register of Deeds of Wyandotte County, Kansas, from recording and filing any instrument of conveyance on said tract. Plaintiffs alleged that they were descendants of the Wyandotte Indian Nation and that the action was brought for the benefit of all interested persons. It was alleged that the matter in controversy exceeded, exclusive of interest and costs, $10,000.00. In Number KC-1279, City of Kansas City v. the same defendants, the plaintiff sought similar relief. In addition to the general allegations of the complaint in Number KC-1280, which plaintiff incorporated, the complaint in this case alleged that plaintiff and the United States had expended large sums on the rehabilitation and maintenance of the cemetery, that on March 20, 1918, plaintiffs

entered into a contract with the United States to make improvements to the cemetery and to maintain it forever, and that the City had expended large sums of money in compliance with the terms of the contract. Both complaints sought the judgment of the court declaring null and void the Act of Congress of August 1, 1956, 70 Stat. 893, under authority of which the sale proceedings were being conducted, and to enjoin the sale of the cemetery.

In both cases, the defendants, the United States, Fred A. Seaton, Secretary of the Interior, and the Wyandotte Tribe of Oklahoma, a corporation, filed a motion to dismiss on the grounds that: (1) The complaint fails to state a cause of action against said defendants upon which relief can be granted; (2) The Court lacks jurisdiction of said defendants in this action; (3) The court lacks jurisdiction of the subject matter of this suit; (4) The cause of action is not one upon which the United States has consented to be sued; (5) With respect to the defendant, Fred A. Seaton, Secretary of the Interior, venue lies only in the district of his official residence which is Washington, D.C.; (6) The cause of action against the defendant, the Wyandotte Tribe of Oklahoma, is an action that has not been authorized by an Act of Congress.

Because both actions sought to enjoin an Act of Congress, a Three-Judge Court was constituted to hear and determine the issues, and since both cases presented substantially the same basic issues, they were consolidated for trial. The consolidated action came on for hearing at Kansas City, Kansas, on May 4, 1960, on defendants' motions to dismiss. In order to obviate the necessity of two hearings, it was stipulated and agreed that defendants should file their answers without prejudice to their motions to dismiss, so if the court overruled the motions or concluded it was not necessary to pass thereon, it could then determine the case on the merits.

FINDINGS OF FACT.

There is no disputed issue of fact and the question presented is solely one of law. The Wyandotte Tribe of Indians[1] has a long history going back many years, and including their dealings not only with the Government of the United States but also with the Delaware Indians. It is not necessary to set out that history in detail. It is only necessary to say as a result of a number of transactions with the Delawares, the Tribe, on December 14, 1843, acquired from them thirty-six sections of land by purchase with funds ultimately obtained from the United States. They also obtained by donation three additional sections of land. This tract was situated at the point of the Junction of the Missouri and Kansas Rivers. The cemetery in controversy herein was a part of this tract.

By Article 1 of the Treaty of January 31, 1855 (10 Stat. 1159), between the United States and the Tribe, the Tribe was to be dissolved on the ratification of the Treaty, and the members thereof were to be made citizens of the United States. The Act provided for a limited time for such persons as did not desire emancipation to apply for exemption from the provisions of the Act. By Article 2, the Wyandotte Nation ceded the land above designated to the United States for subsequent subdivision, in severalty, to qualified Indians, "except as follows, viz: The portion now enclosed and used as a public burying-ground, shall be permanently reserved and appropriated for that purpose * * *."

All lands ceded to the United States were subsequently allotted to individual Indians qualified to receive them, except so far as material here Allotment Number 282, the Hu-

1. Herein called the Tribe.

ron Place Cemetery, the subject of this litigation. A small group of Indians wh may be referred to as the Splinter Group did not accept citizenship. They left the area and moved to a reservation in Oklahoma. They have not used the cemetery since their removal to Oklahoma. Under subsequent laws, they incorporated as the Wyandottes of Oklahoma, and as such corporation are a party-defendant to this action. Huron Place Cemetery has been used as a burial ground for Wyandotte Indians for more than a century and there is evidence that some 800 Indians have been buried there. Since the incorporation of the Wyandottes of Oklahoma, the United States has dealt with them as the sole representative of the Wyandotte Indians. Plaintiffs and those associated with them in interest are excluded from membership in the Wyandottes of Oklahoma. It is also clear that there is a sharp conflict in interest with respect to the cemetery between the two groups. Plaintiffs and those associated with them are using and want to continue to use the cemetery as a burial ground, while the Wyandottes of Oklahoma, do not use it and since their removal to Oklahoma have not used it. They have no interest in maintaining it as a cemetery.

On March 20, 1918, the Superintendent of the Haskell Institute at Lawrence, Kansas, on behalf of the Commissioner of Indian Affairs, entered into a contract with Kansas City, Kansas, which, in substance, provided that the United States would pay the City the sum of $1,000, and in addition, make certain specified improvements, and in consideration thereof, the City agreed to have work done as set out in other specifications and further "agrees to forever maintain" the cemetery and park as it maintains its other public parks.

Section 5 (c) of Public Law 887 (Aug. 1, 1956), upon which this action is predicated, provides for the transfer or sale of the Huron Place Cemetery in accordance with subsections (a) and (b) of Section 5, and the use of the proceeds from such sale for the removal and reburial of the remains of those now buried in the cemetery and for the erection of a monument to their memory. It is to prevent a proposed sale under this Act that these actions were instituted.

CASE NUMBER 1280.

One ground of the motion to dismiss is that the United States has not consented to be sued; that the Secretary of the Interior can be sued only at the place of his official residence which is in Washington, D. C.; and that an action against the Indian Tribe of Oklahoma, a corporation, has not been authorized by Act of Congress.

We do not find it necessary to determine whether the Court has jurisdiction of the United States, the Secretary of the Interior, or the Oklahoma Tribe of Indians, because, in any event, as we view the case, the action must be dismissed. It is our conclusion that plaintiffs do not have a cause of action and are without standing in court to test the constitutionality of the Act in question. A great number of authorities are cited by the various parties dealing with Indian affairs in support of their respective contentions which we do not deem necessary to analyze or consider in reaching our decision. We feel that Conley v. Ballinger, 216 U.S. 84, is dispositive of every issue presented in this case. Plaintiffs seek to distinguish this case but in the alternative ask us to overrule it if it cannot be distinguished. We think it cannot be distinguished and if it

is to be overruled, that is for the Supreme Court and not for this Court.

In the Conley case, the Court considered the Act of Congress of June 21, 1906. That Act, as the Act of 1915, authorized the sale of the Huron Place Cemetery. The only difference in the two Acts is that the Act of 1906 directed the proceeds of the sale to be distributed to the Parties to the Treaty of 1855, while the present Act directs that the net proceeds be distributed to the Wyandotte Tribe of Oklahoma.

Plaintiffs seek to distinguish the Conley case on the ground that Conley was brought as an individual action in which plaintiff was unable to establish that she had an individual right of the value of at least $2,000. We do not so narrowly construe the decision of the Court. The Court recognized that the action had been brought without the aid of counsel. The opinion makes it clear that the Court sought to determine if any cause of action could be stated.

The Court based its ultimate decision on the ground that it was impossible for Conley to state a cause of action. The Court said: "But if it is obvious that the bill could not be amended so as to state a case within the jurisdiction of the court, the judgment must be affirmed * * *." The Court, in effect, treated the action as a class action. Thus, the Court said: "The allegation of the plaintiff's interest plainly does not mean that she has taken possession of the whole burying ground and has acquired a seizin of the whole by wrong. As it does not mean that, it must mean simply a statement of the rights that the plaintiff conceives to have been conferred by the Treaty of 1855 *upon those whom she represents.*"[2] If Conley, as an individual,

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[2] Emphasis supplied.

had no individual rights under the Treaty which she could enforce in a court of law, then plaintiffs in this action, and those similarly situated, have no individual rights which they may enforce herein.

Speaking of the cemetery tract, the Court, in the Conley case, said: "It seems to us more reasonable to suppose that the words 'shall be permanently reserved and appropriated for that purpose,' like the rest of the treaty, were addressed only to the tribe and rested for their fulfilment on the good faith of the United States * * *." The Court pointed out that the good faith obligation would not be broken "by a change believed by Congress to be for the welfare of the Indians." Thus, whether the cemetery is to be continued rests in the exercise of the sound discretion of Congress, a discretion which an individual Indian may not challenge and the exercise of which confers no cause of action which may be asserted in a court of law.

CASE NUMBER 1279.

In Number 1279, the City of Kansas City seeks the same relief against the defendants as do the plaintiffs in Case Number 1280. It also asks that the Act of 1956 be declared unconstitutional and that the United States and the Secretary of the Interior be enjoined from selling the cemetery. It predicates its cause of action upon the contract of March 29, 1918, with the Secretary of the Interior. It construes this contract as an agreement on the part of the United States to forever maintain the Huron Place Cemetery. We do not so construe it. No where therein does the Government, or its agent, agree to maintain the cemetery permanently or for any period of time. True, the contract binds the City to forever

maintain the cemetery. We construe this to mean no more than that the City binds itself to maintain the cemetery as a public park so long as it is being used for that purpose.

Furthermore, if the contract should be construed as a binding obligation on the part of the Secretary of the Interior to forever maintain the cemetery as a burial place for Indians, it would be void and unenforceable because so construed, it would be in derogation of the inherent power of Congress to deal with Indian lands entrusted to its care as it thought best.

For the reasons above stated, we conclude that the complaint in each case fails to state a cause of action giving this court jurisdiction, and that the motions to dismiss such complaints should be sustained. Formal decrees consistent with the views of the court will be prepared for entry.

/s/ Walter A. Huxman
/s/ John C. Pickett
/s/ Delmas C. Hill.

Public Law 887 - 84th Congress
Chapter 843 - 2d Session
S. 3970

AN ACT

To provide for the termination of Federal supervision over the property of the Wyandotte Tribe of Oklahoma and the individual members thereof, and for other purposes.

Wyandotte Tribe, Okla. Termination of Federal supervision.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the purpose of this Act is to provide for the termination of Federal supervision over the trust and restricted property of the Wyandotte Tribe of Oklahoma and the individual members thereof, and for a termination of Federal services furnished to such Indians because of their status as Indians.

Definitions.

SEC. 2. For the purposes of this Act:

(a) "Tribe" means the Wyandotte Tribe of Oklahoma.

(b) "Secretary" means the Secretary of the Interior.

(c) "Lands" mean real property, interest therein, or improvement thereon, and include water rights.

(d) "Tribal property" means any real or personal property, or any interest in real or personal property, that belongs to the tribe and either is held by the United States in trust for the tribe or is subject to a restriction against alienation imposed by the United States.

Membership roll. Publication in FR.

SEC. 3. The tribe shall have a period of six months from the date of this Act in which to prepare and submit to the Secretary a proposed roll of the members of the tribe living on the date of this Act, which shall be published in the Federal Register. The proposed roll shall be prepared in accordance with eligibility requirements prescribed in the tribe's constitution and bylaws. If the tribe fails to submit such roll within the time specified in this section, the Secretary shall prepare a proposed roll for the tribe, which shall be published in the Federal Register. Any person claiming membership rights in the tribe or an interest in its assets, or a representative of the Secretary on behalf of any such person, may, within sixty days from the date of publication of the proposed roll, file an appeal with the Secretary contesting the inclusion or omission of the name of any person on or from such roll. The Secretary shall review such appeals and his decisions thereon shall be final and conclusive. After disposition of all such appeals by the Secretary, the roll of the tribe shall be published in the Federal Register, and such roll shall be final for the purposes of this Act.

Personal property rights.

SEC. 4. Upon publication in the Federal Register of the final roll as provided in section 3 of this Act, the rights or beneficial interests in tribal property of each person whose name appears on the roll shall constitute personal property which may be inherited or bequeathed, but shall not otherwise be subject to alienation or encumbrance before the transfer of title to such tribal property as provided in section 5 of this Act without the approval of the Secretary. Any contract made in violation of this section shall be null and void.

Transfer or distribution of property.

SEC. 5. (a) Upon the request of the tribe, the Secretary is authorized within three years from the date of this Act to transfer to a corporation or other legal entity organized by the tribe in a form satisfactory to the Secretary title to all or any part of the tribal property, or to transfer to one or more trustee designated by the tribe and approved by the Secretary title to all or any part of such property to be held in trust for management or liquidation purposes under such terms and conditions as may be specified by the tribe and approved by the Secretary, or to distribute pro rata among the members of the tribe all or any part of such property, or to sell all or any part of such property and make a pro rata distribution of the proceeds of sale among the members of the tribe after deducting, in his discretion, reasonable costs of sale and distribution.

Trust agreement.

(b) Title to any tribal property that is not transferred in accordance with the provisions of subsection (a) of this section shall be transferred by the Secretary to one or more trustees designated by him for the liquidation and distribution of assets among the members of the tribe under such terms and conditions as the Secretary may prescribe: *Provided*, That the trust agreement shall provide for the termination of the trust not more than three years from the date of such transfer unless the term of the trust is extended by order of a judge of a court of record designated in the trust agreement: *Provided further*, That the trust agreement shall provide that at any time before the sale of tribal property by the trustees the tribe may notify the trustees that it elects to retain such property and to transfer title thereto to a corporation, other legal entity, or trustee in accordance with the provisions of subsection (a) of this section, and that the trustees shall transfer title to such property in accordance with the notice from the tribe if it is approved by the Secretary.

Burying ground, Kansas City, Kans. Sale or transfer.

(c) Title to the tract of land in Kansas City, Kansas, that was reserved for a public burying ground under article 2 of the treaty dated January 31, 1855 (10 Stat. 1159), with the Wyandotte Tribe of Indians shall be transferred or sold in accordance with subsections (a) and (b) of this section, and the proceeds from any sale of the land may be used to remove and reinter the remains of persons who are buried there, to move any monuments now located on the graves and to erect at reasonable cost one appropriate monument dedicated to the memory of the departed members of the Wyandotte Tribe: *Provided*, That if S. 1335 or comparable legislation is enacted by the Eighty-fourth Congress, any sale or transfer of such land shall be deferred until three months after the report required by such legislation has been submitted to Congress, during which time Congress shall decide whether to provide for the sale or disposition of the land on the basis of such report.

Compensation of agents, etc.

(d) The Secretary shall not approve any form of organization pursuant to subsection (a) of this section that provides for the transfer of stock or an undivided share in corporate assets as compensation for the services of agents or attorneys unless such transfer is based upon an appraisal of tribal assets that is satisfactory to the Secretary.

Selection of trustees.

(e) When approving or disapproving the selection of trustees in accordance with the provisions of subsection (a) of this section, the Secretary shall give due regard to the laws of the State of Oklahoma that relate to the selection of trustees.

Transfer to members.

SEC. 6. (a) The Secretary is authorized and directed to transfer within three years after the date of this Act to each member of the tribe unrestricted title to funds or other personal property held in trust for such member by the United States.

Removal of restrictions.

(b) All restrictions on the sale or encumbrance by the owners of trust or restricted lands that were originally allotted to persons who were at the time of allotment members of the tribe, regardless of whether such owners are themselves members of such tribe, and all restrictions on the sale or encumbrance of trust or restricted land owned by members of the tribe (including allottees, heirs, and devisees either adult or minor), regardless of where the land is located, are hereby removed three years after the date of this Act and the patents or deeds under which titles are then held shall pass the titles in fee simple subject to any valid encumbrance. The titles to all interests in trust or restricted land acquired by members of the tribe by devise or inheritance three years or more after the date of this Act shall vest in such members in fee simple, subject to any valid encumbrance.

(c) Prior to the time provided in subsection (b) of this section for the removal of restrictions on land owned by more than one member of the tribe, the Secretary may— Partition or sale before removal of restrictions.

(1) upon request of any of the owners made within two years after the date of this Act, partition the land and issue to each owner a patent or deed for his individual share that shall become unrestricted three years from the date of this Act;

(2) upon request of any of the owners and a finding by the Secretary that partition of all or any part of the land is not practicable, cause all or any part of the land to be sold at not less than the appraised value thereof, and distribute the proceeds of sale to the owners: *Provided*, That any one or more of the owners may elect before a sale to purchase the other interests in the land at not less than the appraised value thereof, and the purchaser shall receive an unrestricted patent or deed to the land; and

(3) if the whereabouts of none of the owners can be ascertained, cause such lands to be sold and deposit the proceeds of sale in the Treasury of the United States for safekeeping.

SEC. 7. (a) The Act of June 25, 1910 (36 Stat. 855), the Act of February 14, 1913 (37 Stat. 678), and other Acts amendatory thereto shall not apply to the probate of the trust and restricted property of the members of the tribe who die six months or more after the date of this Act. Probate, etc. 25 USC 372 et seq.

(b) The laws of the several States, Territories, possessions, and the District of Columbia with respect to the probate of wills, the determination of heirs, and the administration of decedents' estates shall apply to the individual property of members of the tribe who die six months or more after the date of this Act.

SEC. 8. No property distributed under the provisions of this Act shall at the time of distribution be subject to Federal or State income tax. Following any distribution of property made under the provisions of this Act, such property and any income derived therefrom by the individual, corporation, or other legal entity shall be subject to the same taxes, State and Federal, as in the case of non-Indians: *Provided*, That for the purpose of capital gains or losses the base value of the property shall be the value of the property when distributed to the individual, corporation, or other legal entity. Tax exemption.

SEC. 9. Prior to the transfer of title to, or the removal of restrictions from, property in accordance with the provisions of this Act, the Secretary shall protect the rights of members of the tribe who are minors, non compos mentis, or in the opinion of the Secretary in need of assistance in conducting their affairs by causing the appointment of guardians for such members in courts of competent jurisdiction, or by such other means as he may deem adequate. Appointment of guardians.

SEC. 10. Pending the completion of the property dispositions provided for in this Act, the funds now on deposit or hereafter deposited in the Treasury of the United States to the credit of the tribe shall be available for advance to the tribe, or for expenditure, for such purposes as may be designated by the governing body of the tribe and approved by the Secretary. Advances of funds.

SEC. 11. The Secretary shall have authority to execute such patents, deeds, assignments, releases, certificates, contracts, and other instruments as may be necessary or appropriate to carry out the provisions of this Act, or to establish a marketable and recordable title to any property disposed of pursuant to this Act. Execution of patents, etc.

SEC. 12. Nothing in this Act shall abrogate any valid lease, permit, license, right-of-way, lien, or other contract heretofore approved. Whenever any such instrument places in [illegible] Prior leases, etc.

ject thereto, the Secretary may transfer such functions, in whole or in part, to any Federal agency with the consent of such agency, or to a State agency with the consent of such agency and the other party or parties to such instrument.

Termination proclamation. Publication in FR.

SEC. 13. (a) Upon removal of Federal restrictions on the property of the tribe and individual members thereof, the Secretary shall publish in the Federal Register a proclamation declaring that the Federal trust relationship to the affairs of the tribe and its members has terminated. Thereafter individual members of the tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians, all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.

Citizenship.

(b) Nothing in this Act shall affect the status of the members of the tribe as citizens of the United States.

Educational program.

(c) Prior to the issuance of a proclamation in accordance with the provisions of this section, the Secretary is authorized to undertake, within the limits of available appropriations, a special program of education and training designed to help the members of the tribe to earn a livelihood, to conduct their own affairs, and to assume their responsibilities as citizens without special services because of their status as Indians. Such program may include language training, orientation in non-Indian community customs and living standards, vocational training and related subjects, transportation to the place of training or instruction, and subsistence during the course of training or instruction. For the purposes of such program, the Secretary is authorized to enter into contracts or agreements with any Federal, State, or local governmental agency, corporation, association, or persons. Nothing in this section shall preclude any Federal agency from undertaking any other program for the education and training of Indians with funds appropriated to it.

Revocation of charter. 25 USC 501-509.

SEC. 14. (a) Effective on the date of the proclamation provided for in section 13 of this Act, the corporate charter issued pursuant to the Act of June 26, 1936 (49 Stat. 1967), as amended, to the Wyandotte Tribe of Oklahoma and ratified by the tribe on July 24, 1937, is hereby revoked.

Termination of powers.

(b) Effective on the date of the proclamation provided for in section 13 of this Act, all powers of the Secretary or other officer of the United States to take, review, or approve any action under the constitution and bylaws of the tribe are hereby terminated. Any power conferred upon the tribe by such constitution which are inconsistent with the provisions of this Act are hereby terminated. Such termination shall not affect the power of the tribe to take any action under its constitution and bylaws that is consistent with this Act without the participation of the Secretary or other officer of the United States.

Claims.

SEC. 15. Nothing in this Act shall affect any claims heretofore filed against the United States by the tribe.

Water rights.

SEC. 16. Nothing in this Act shall abrogate any water rights of the tribe or its members.

Rules and regulations.

SEC. 17. The Secretary is authorized to issue rules and regulations necessary to effectuate the purposes of this Act and may in his discretion provide for tribal referendums on matters pertaining to management or disposition of tribal assets.

Repeals. 25 USC 501-509.

SEC. 18. All Acts or parts of Acts inconsistent with this Act are hereby repealed insofar as they affect the tribe or its members. The Act of June 26, 1936 (49 Stat. 1967), and the Act of June 18,

(48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378), shall not apply to the tribe and its members after the date of the proclamation provided for in section 3 of this Act. 25 USC 461-479.

SEC. 19. If any provision of this Act, or the application thereof, to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby. Separability

Approved August 1, 1956.

25 U.S.C., Sec. 345:

"345. Actions for allotments. All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands held August 15, 1894, by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: PROVIDED, That the right of appeal shall be allowed to either party as in other cases. (Aug. 15, 1894, c. 290, Sec. 1, 28 Stat. 305; Feb. 6, 1901, c. 217, Sec. 1, 31 Stat. 760; Mar. 3, 1911, c. 231, 36 Stat. 1167.)"

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No. 657

In the Supreme Court of the United States

OCTOBER TERM, 1960

CITY OF KANSAS CITY, KANSAS, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

and

GEORGE ZANE, JR., ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

On Appeal from the United States District Court for the District of Kansas

---

MOTION TO AFFIRM

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MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1, of the Revised Rules of this Court, the Solicitor General, on behalf of the United States, the Secretary of the Interior, and the Wyandotte Tribe of Oklahoma, respectfully moves that the judgment of the United States District Court for the District of Kansas be affirmed on the ground that the questions in this case are so unsubstantial as not to require further argument.

STATEMENT

These two suits were instituted in July 1959 by the City of Kansas City, Kansas, and the individual appellants to have Section 5(c) of the Act of August 1, 1956, 70 Stat. 893, 25 U.S.C. 795(c), declared unconstitutional and to enjoin the defendants from acting under that section.[1] The section authorizes the Secretary of the Interior to transfer or sell the Huron Place Cemetery in Kansas City, Kansas, upon the request of the Wyandotte Indian Tribe of Oklahoma. Because the suit sought an injunction restraining the operation of an Act of Congress as unconstitutional, a three-judge district court was convened pursuant to the provisions of 28 U.S.C. 2282 and 2284. On September 28, 1960, the three-judge court issued findings of fact and an opinion. It held that the complaints failed to state a cause of action giving the court jurisdiction and that the defendants' motions to dismiss the complaints should be sustained (Jurisdictional Statement, pp. A1-A9). On October 13, 1960, the court entered final judgment sustaining the motions to dismiss (R. 50). Appellants filed notices of appeal from this judgment on November 16, 1960, invoking the jurisdiction of this Court under 28 U.S.C. 1253 (R. 52).

The two complaints state that the Huron Place Cemetery has existed as the Wyandotte National Burial Ground since 1843 and that it was explicitly reserved for that purpose by Article 2 of the Treaty

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[1] The statutory provision is set out in an appendix to the Jurisdictional Statement (p. A12).

of January 31, 1855, 10 Stat. 1159, between the Wyandotte Tribe of Indians and the United States. Article 1 of the Treaty provided that, upon ratification of the Treaty, the Tribe was to be dissolved and its members made citizens of the United States. By Article 2, the Wyandotte Nation ceded the land to the United States for subsequent subdivision, in severalty, to qualified Indians, "except as follows, viz: The portion now enclosed and used as a public burying-ground, shall be permanently reserved and appropriated for that purpose * * *." The word "public," the complaints allege, refers only to members of the Wyandotte Indian Nation and their descendants, and the cemetery has always been limited to their use. Both complaints allege that several hundred descendants of the Wyandotte Indian Nation, including the five individual plaintiffs, live in Kansas City, Kansas, and that they have a valuable, personal and vested right, guaranteed by the Treaty of 1855, to be buried without cost in the cemetery.

Under the authority of the Act of June 26, 1936, 49 Stat. 1967, 25 U.S.C. 503, the Secretary of the Interior, in 1937, issued a corporate charter creating the Wyandotte Tribe of Oklahoma. But both complaints allege that the Wyandotte Indian Nation had ceased to exist by virtue of the Treaty of 1855 and that the Department of the Interior's consistent dealings with, and treatment of, the members of the Wyandotte Tribe of Oklahoma as representatives of all the Wyandottes are "false, fraudulent, presumptive, arbitrary and invalid for the reason that such people are but a minor portion of those of Wyandotte

descent for whom the cemetery was reserved." The five individual plaintiffs in Number KC-1280 allege that they are descendants of the Wyandotte Indian Nation and that the action is brought for the benefit of all interested persons, and further that the Wyandotte Tribe of Oklahoma has never represented all the Wyandotte descendants. This complaint also indicates that the five individual plaintiffs had sought to be placed on the rolls of the Wyandotte Tribe of Oklahoma but had been excluded (see Jurisdictional Statement, p. 11).

Each of the two complaints alleged that the Wyandotte Tribe of Oklahoma has on many occasions stated its intention to remove the remains of the persons buried in the cemetery and to sell the property for commercial purposes, as they are empowered to do by the challenged statute, and that this would destroy the cemetery and make it unavailable to the descendants of those Wyandottes who were parties to the Treaty of 1855. Such action, it is complained, would deprive the individual plaintiffs (and persons similarly situated) of their property without due process of law and deny them the equal protection of the laws. In addition, the City of Kansas City states as a second count in Number KC-1279 that the challenged statute is an attempt to abrogate a contract between the city and the United States under which the city has maintained the cemetery as one of its own parks. By the destruction of the cemetery, this count concludes, the citizens of Kansas City and of the entire nation would suffer an irreparable loss to their common historical heritage.

The United States Attorney, on behalf of the United States, the Secretary of the Interior, and the Wyandotte Tribe of Oklahoma, which were named as defendants together with the local register of deeds, filed motions to dismiss each suit on several grounds. The three-judge court, passing questions as to jurisdiction over the parties, held that the statute was constitutional and that the power of Congress to enact it could not be contracted away.

ARGUMENT

The principles governing this case are well established and plainly required dismissal of the appellants' complaints.

1. This Court has frequently held that the power of Congress over the disposition of Indian lands is plenary and political, and therefore not subject to judicial control. In *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 308, this Court said:

> The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts.

See, also, *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 564-567.

Conley v. *Ballinger*, 216 U.S. 84, relied upon by the court below, is but an application of this general principle to the particular factual situation presented here. Mr. Justice Holmes, speaking for the Court, noted that the Huron Place Cemetery was in the

same legal status after the Treaty of 1855, 10 Stat. 1159, as it had been before the Treaty:

> There is no question as to the complete legislative power of the United States over the land of the Wyandottes while it remained in their occupation before their quitclaim to the United States. *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565. When they made that grant they excepted this parcel. Therefore it remained, as the whole of the land had been before, in the ownership of the United States, subject to the recognized use of the Wyandottes. * * * [216 U.S. at 90.]

Since the legal status of the cemetery has not changed since *Conley* v. *Ballinger*, the court below was correct in following that case and in stating:

> [W]hether the cemetery is to be continued rests in the exercise of the sound discretion of Congress, a discretion which an individual Indian may not challenge and the exercise of which confers no cause of action which may be asserted in a court of law. [Jurisdictional Statement, p. A8.]

Moreover, even assuming that a suit would lie to obtain just compensation under the Fifth Amendment, as in *Sioux Tribe* v. *United States*, 316 U.S. 317, and *United States* v. *Creek Nation*, 295 U.S. 103, no injunction to prevent an alleged taking may issue. *Hurley* v. *Kincaid*, 285 U.S. 95.[2]

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[2] If appellants were suing for just compensation on the theory that their property had been taken, the district court would not be the proper forum. The district court's Tucker Act jurisdiction is limited to suits for less than $10,000, 28 U.S.C. 1346(a)(2), but appellants have alleged that the amount in controversy exceeds that amount.

2. The district court's dismissal of the suits was also proper because it did not have jurisdiction over three of the defendants, one of which, the United States, is an indispensable party. The suit affects lands in which the United States has an interest and therefore the United States is indispensable. *Minnesota* v. *United States*, 305 U.S. 382, 386; *United States* v. *Alabama*, 313 U.S. 274, 282; *Maricopa County* v. *Valley Bank*, 318 U.S. 357, 362; *Osage Tribe* v. *Ickes*, 133 F.2d 47 (C.A. D.C.). Appellants seek to find congressional consent to suit in the Act of August 15, 1894, 28 Stat. 305, as amended, 25 U.S.C. 345 (Jurisdictional Statement, pp. 16, A17). But this statute gives the district courts jurisdiction only over suits involving rights to allotments of Indian land under any law or treaty. By the terms of Article 2 of the Treaty of 1855, 10 Stat. 1159, to which appellants trace their rights, the Huron Place Cemetery was explicitly excluded from the Wyandotte land ceded to the United States for subdivision in severalty to the members. Thus it was never subject to allotment.

As to the other two defendants, the official residence of the Secretary of the Interior is the District of Columbia, and he is not subject to service or amenable to suit in his official capacity anywhere else. *Butterworth* v. *Hill*, 114 U.S. 128, 132; *Blackmar* v. *Guerre*, 342 U.S. 512, 516. Service on the Wyandotte Tribe of Oklahoma was attempted under 28 U.S.C. 1655, which provides for service on out-of-state defendants in actions "to enforce any lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to, real or personal property * * *."

This provision plainly provides for service on absent defendants only in actions *in rem*, not *in personam*. Appellants' suits sought an injunction against the Tribe itself and so did not come within the meaning of 28 U.S.C. 1655.[3]

3. Finally, the appellants lacked standing.

The five individual plaintiffs allege that they are descendants of the Wyandotte Indian Nation, but at the same time admit that they are not members of the Wyandotte Tribe of Oklahoma which Congress regards as the equitable owner of the cemetery. The exclusion of the individual plaintiffs from the final roll left them outside the Tribe and therefore left them without standing to challenge either tribal or congressional plans for the disposition of tribal property.

The City of Kansas City, Kansas, has no standing to bring a suit on behalf of some of its citizens who happen to be of Wyandotte descent. Any dispute affecting the rights of these people is between them and the Wyandotte Tribe, or between them and the

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[3] The Charter of the Wyandotte Tribe, which was adopted under the 1936 Act, provides in Section 3(b) that the Tribe has the corporate power to sue and be sued, subject to the proviso:

> That the grant or exercise of such power shall not be deemed a consent by the Tribe or by the United States to the levy of any judgment, lien or attachment upon the property of the Tribe other than income or chattels specially pledged or assigned.

Thus Congress has not consented to the bringing of this type of suit against the Wyandotte Tribe. See *United States* v. *United States Fidelity Co.*, 309 U.S. 506, 512; *Turner* v. *United States*, 248 U.S. 354, 358.

United States, and "it is no part of [the city's] duty or power to enforce their rights in respect of their relations" with either of these sovereigns. *Massachusetts* v. *Mellon*, 262 U.S. 447, 485-486. Whatever standing the city has to maintain an action arises not from the fact that some of its citizens may be Wyandottes, but from the fact that it is a party to a contract with the United States. Although this contractual status might give the city standing to sue for proper relief in the proper forum, it does not give it a right to the relief it seeks here, the United States not having consented to suits for specific relief. *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 704.[4]

CONCLUSION

For the foregoing reasons, it is believed that there is no substantial question involved and that the judgment of the district court should be affirmed.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.
J. EDWARD WILLIAMS,
Acting Assistant Attorney General.
ROGER P. MARQUIS,
HUGH NUGENT,
Attorneys.

FEBRUARY 1961.

[4] As to the merits of the contractual claim, we believe that the District Court correctly construed the contract as not requiring the government "to maintain the cemetery permanently, or for any period of time" (Jurisdictional Statement, p. A8).

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